APPENDIX A

U.S. v. Washington, 86 F.3d 1499
(9th Cir. 1996) (Kleinfeld, J., dissenting)

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

With respect to timeliness, two aspects of this case justify the prospective intervenors' delay. First, they do not seek to relitigate what the court decided prior to the motions to intervene. Though they do not agree with the court's decisions, their motions ask leave to intervene only with respect to the implementation plans to be prepared subsequently, and a subsequent appeal.

The majority opinion misconstrues the intervenors' position as an attempt to relitigate what has already been decided. The parties seeking intervention do not agree that sea cucumbers etc. are fish covered by the treaty, but they say expressly in their motion to intervene that they do not propose to relitigate it in the district court:

> Inner Sound . . . move[s] . . . for intervention in this action for the limited purpose of participating in the negotiation and formation of those provisions of the Court's implementation plan pursuant to the Court's memorandum opinion and order dated December 20, 1994 and any and all proceedings related to the Implementation Plan or implementation of this Court's decision of December 20, 1994. Applicants for intervention do not seek to relitigate previously decided issues, to reopen evidentiary issues, or to conduct discovery unrelated to their requested participation herein.

Harvest Divers likewise limit their motion to intervene. Their motion says they "accept the record in this proceeding as it is made to date," but they want to protect their

right to appeal the sea urchin and sea cucumber ruling now that the Washington Attorney General has withdrawn from its previous opposition to it, and want to be allowed to participate in the negotiations regarding implementation of the district court's implementation plan.

As the majority opinion concedes, the general rule disfavoring post-judgment motions to intervene does not apply if the motion seeks only to participate in the appeal. *United States ex rel. McGough v. Covington Technologies,* 967 F.2d 1392, 1395 (9th Cir. 1992); *Yniguez v. State of Arizona,* 939 F.2d 727, 734 (9th Cir. 1991). That exception applies here precisely, insofar as what they intervenors seek is the ability to participate in an appeal. It applies by analogy, insofar as the intervenors seek only to participate in the implementation negotiations following the court's decision on the substantive issue of whether the crabs, sea urchins and the sea cucumbers are fish covered by the treaty.

Second, the rule disfavoring post-judgment litigation had no application when the motions to intervene were denied, because this case had not gone to final judgment. As the majority opinion concedes, the motions to intervene were filed in March and denied in April, and the court directed that final judgment be entered in accord with its decision in August. Actually, final judgment is probably a misnomer even at that later time. There has been a final decision by the district court on an issue, but nothing to suggest that the litigation has reached an end. This litigation began in 1970. It has gone on for 2½ decades, and promises to go on indefinitely into the future, as the district court protects treaty rights to the fish in the circumstances arising from time to time. This is not like a traditional suit at equity, such as a suit for specific performance of a contract to convey real estate. In that kind

of lawsuit, the final judgment enjoins the defendant to execute a conveyance, he does, and the case is over. This case will not be over. The opinion purporting to be the decision on which final judgment was issued says that "because the Court desires to have the benefit of the parties' prior experience in *Washington I,* the Court defers the issue of injunctive relief or any plan of implementation until there has been input from the parties." *United States v. State of Washington,* 873 F.Supp. 1422, 1450 (W.D. Wash.1994). It does not purport to end the district court's control of the industry, end the process of adjudicating Indian treaty rights regarding the industry, or to be the injunction sought under Federal Rule of Civil Procedure 65(d). The district court determination that it needed "input from the parties" before issuing an injunction shows that what had been issued was not the final judgment.

In practical effect, the United States District Court regulates the Puget Sound fishery to protect treaty rights, has done so for twenty-five years, and there is no reason to doubt that it will do so for another twenty-five years. Where a district court controls an industry for decades or indefinitely, the length of the lawsuit makes it inequitable to exclude late participants in the manner which would be appropriate for a traditional suit at equity. *See Textile Workers Union v. Allendale Co.,* 226 F.2d 765, 767 (D.C.Cir.1955) ("Obviously tailored to fit ordinary civil litigation, these provisions require other than literal application in atypical cases").

In twenty-five years, the sea changes, in terms of what creatures are scarce or plentiful in Puget Sound, the technology changes, in terms of how practical it is to fish for one or another creature, and the market changes, in terms of how interested Japanese or American consumers may be in the catch. The eleven-year old child of a halibut

fisherman when this lawsuit started in 1970 may now be the thirty-six year old skipper of a crab boat, with a different kind of participation in the industry and different economic interests than his father's. Where a federal district court makes itself a permanent regulatory agency for an industry, it ill behooves the judiciary to exclude people who earn their living in the industry from being heard on how they shall be regulated, on the ground that they did not complain about other decisions at an earlier time.

As for prejudice to other parties by prolonging the litigation, there is no such thing as prolongation of something which has no end. Nor should we be concerned with preserving a delicate compromise the parties may work out, if other parties with important, unrepresented interests are excluded. A compromise between A and B in which they decide to take C's fish does not deserve protection.

As for reasons for delay, there are two reasons why this factor should not cut against the intervenors. One is that the reasons were adequate. Intervention would not have been necessary had the state won a substantive decision that the sea creatures were not covered by the treaty, and Harvest Divers would not have needed to intervene if Inner Sound had succeeded. Second, intervention in a huge suit at equity is very expensive. Someone must pay the lawyers. Parties with economic interests necessarily must weigh the huge litigation expense against the risk, and postpone bearing the expense as long as possible. We should not add to the risks and increase the penalties for late intervention, in a long-term regulatory equitable proceeding such as this one. That would cause numerous parties to intervene earlier, wasting their money and the court's time. The prospective intervenors' practical decision to let the Washington Attorney General do the work so long as she was on their side saved themselves and their adversaries money, and saved the court as well as the par-

ties a great deal of needless effort. That is praiseworthy, not punishable.

The would-be intervenors have "an interest relating to the property of the transaction which is the subject of the action" and are "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest." That is the standard for mandatory intervention under Federal Rule of Civil Procedure 24(a). The intervenors' interest is protected by the treaty, by the same words as the Indian tribes' interest. The words of the Indian treaty, which is the basis for the claims asserted in this action, protect "all citizens," not just the Indian tribes:

> The right of taking fish, at all usual and accustomed ground and stations, is further secured to said Indians, *in common with all citizens* of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horse on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens.

Art. III of the Treaty of Medicine Creek, 10 Stat. 1133 (as quoted in *Washington v. Washington State Commercial Passenger Fishing Vessel Association (Fishing Vessel)*, 443 U.S. 658, 674, 99 S.Ct. 3055, 3069, 61 L.Ed.2d 823 (1979) (emphasis added)).

The Supreme Court has already construed these words to create a treaty right to fish for non-Indian fishermen as well as Indian fishermen. "*Both sides* have a right, secured by treaty, to take a fair share of available fish." *Id.* at 684-85, 99 S.Ct. at 3074 (emphasis added). That means that the non-Indian fishermen have a "right, secured

by treaty." It may be that the State of Washington adequately represented the interests of the would-be intervenors prior to the decision on the substantive issue of whether the sea cucumbers, etc., are fish covered by the treaty. If so, then the would-be intervenors were, prior to that decision, "adequately represented by existing parties," so they were not entitled to intervention. Fed.R.Civ.P. 24(a). But once the state changed its position, then the would-be intervenors' interests were no longer "adequately represented by existing parties." That entitled them to intervene as of right.

Rule 24 is traditionally construed liberally in favor of intervention. *See, e.g., Wahington State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman,* 684 F.2d 627 (9th Cir.1982). Where there is "a relationship between the legally protected interests and the claims at issue," that is generally enough for intervention. *Sierra Club v. EPA,* 995 F.2d 1478, 1484 (9th Cir.1993). The intervenors' claims in this case relate to their legally-protected interests under the treaty to share the fish in common with the Indian tribes. Reliance before the substantive decision on the state was a reasonable justification for delaying the motion to intervene until afterward, as we held in *Yniguez v. State of Arizona,* 939 F.2d 727.

The district court regulates the industry in which the proposed intervenors earn their livelihoods. They should be allowed to sit at the table where the compromises are made which will determine whether they can continue to earn an honest living in that industry.

APPENDIX B

Swarztrauber, Sayre A., *The Three-Mile Limit of Territorial Seas,* Annapolis, Maryland: Naval Institute Press, (1972):

> That the three-mile limit did emerge and exist as a rule of international law scarcely needs proving, although in the course of this book that will be accomplished for reasons of completeness.

Id. at 2.

> [T]his book gathers pertinent information and data concerning the three-mile limit from all available sources, and organizes it in historical sequence, utilizing the three-mile rule itself as the *central* theme.

Id. at 3 (emphasis added).

> The *territorial sea* is that belt of the sea adjacent to the coast of a state, beyond its land territory and its internal waters, over which the *sovereignty* of the state extends.

Id. at 3 (emphasis added).

> The three-mile limit under international law can be defined as the *limitation* of the seaward extension of a coastal state's territorial jurisdiction at the outer boundary of a zone of water extending three miles from the shore of that state. The miles are nautical miles, and they are measured from the low-water mark.

Id. at 7-8 (emphasis added).

> The three-mile limit of territorial seas, as a rule of international law, did not surface until the eighteenth century, but the concept of territorial seas had developed much earlier.

Id. at 10.

> [C]oncept that jurisdiction over the adjacent seas was a function of the effective extent of control from the land, a concept which would capture the fancy of statesmen for the next 300 years.

Id. at 20.

> Neither of these concepts dealt, except in an ancillary context, with *fishing, one of the most important of the reasons that states claim territorial seas.*

Id. at 43 (emphasis added).

> On November 8, 1793, Jefferson sent notes, almost identical in substance, to Genet and to the British minister, Mr. G. Hammond, fixing "provisionally" United States' territorial seas at three miles.

Id. at 57.

> Concerning Jefferson's mention of the three-league practice, it must be assumed that as Secretary of State he was familiar with the provisions of the 1763 Treaty of Paris between England and France, *fixing a three-league fishing zone along the North American mainland.*

Id. at 59 (emphasis added).

> The Act of 1794 . . . Seven months after the Jefferson notes were delivered to Genet and Hammond, the three-mile limit became the law of the land, enacted by the Congress of the United States:
>
> > Section 6. And be it further enacted and declared, that the *district courts* shall take cognizance of complaints, by whomsoever instituted, in cases of captures made within the waters of the United States or within a *marine league* of the coasts or shores thereof.[27]

Id. at 59-60 (emphasis added).

> *The Fishing Convention 1818* . . . With these several court cases, the three-mile limit had been ad-

> vocated by publicists, adopted as foreign policy, incorporated into domestic statutes, and upheld by the courts. All that was lacking was the recognition of the three-mile limit between governments in the form of an international treaty. *This came in 1818.*

Id. at 61.

> Convention of 1818 . . . The Americans wished to fish Canadian waters right up to the shore; the British wished to exclude them entirely. A compromise was inevitable, and again it was a *three-mile limit that became the compromise solution.* The key sentence in the Convention of 1818 reads:
>
> > And the United States hereby renounces, for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbors of His Britannic Majesty's dominions in America . . . .

Id. at 63 (emphasis added) (footnote omitted).

> While the Americans would have preferred a *wider* territorial sea along their own coast, *they felt they had more to gain by exploiting the British fisheries up to within three miles, than they might lose if foreigners were to fish within three miles of the American coast.*
>
> Thus, illogically, it was a struggling, infant republic that launched the *three-mile rule,* for purposes of neutrality *and for fishing,* and for reasons quite beyond its control.

Id. at 63 (emphasis added).

> Hall's *Treatise* was first published in 1880 and has gone through eight editions. In it, he concluded that the three-mile limit is so well-fixed that it *must*

> *be assumed that a state adheres to it in the absence of an express notice to the contrary.*

Id. at 69 (emphasis added).

> At the same time, Hall seemed quite satisfied with the consistency of British adherence to the three-mile limit by pointing out a *singular departure, the Treaty of Washington of 1846, dividing the 15-mile wide Strait of Juan de Fuca equally between Britain and the United States.*

Id. at 69 (emphasis added) (footnote omitted).

> *United States.* [*S*]*he did not waiver, at least on a formal, official basis, from her 1793 position. On several occasions, in fact, she protested violations of, or departures from, the three-mile limit.*

Id. at 77 (emphasis added).

> Thus, the nineteenth century saw the three-mile rule become a fairly *well-established rule of international law.* All the great powers, and *most* of the lesser ones, had adopted the rule in some form.

Id. at 88 (emphasis added).

> California's State Constitution of 1849 had provided for ownership of the seabed out to three miles . . . .

Id. at 159 (footnote omitted).

> *Fishing.* Very early in U.S. history, the three-mile limit was considered adequate for *fishing* because of the favorable terms of the Convention of 1818 . . . . Then in 1964, she declared her exclusive rights to the living fishery resources of the continental shelf and followed this two years later with a twelve-mile fishing limit for her own coasts.

Id. at 238 (emphasis added).

> The three-mile limit failed primarily on the grounds that it did not provide coastal states a wide enough exclusive *fishing* zone.

Id. at 254 (emphasis added).

The text also quotes the views of "experts" in the area.

> It is very difficult to conceive upon what theory or by what authority any State acting alone could do any such thing, as the *existing jurisdiction rests solely upon common consent as manifested by usage.*

Id. at 127 (emphasis added) (footnotes omitted).

> In the actual conduct of affairs, it is *seldom challenged,* and *never* successfully so . . . . It has, what is still more important, sunk into, and become firmly rooted in, the consciousness of all seafaring men, who are not experts in law and whose ideas it is dangerous to unsettle.

Id. at 129 (emphasis added) (footnote omitted).

> The three-mile limit was supported by international arbitration as early as 1855. A United States-British Claims Commission was appointed under a convention of February 8, 1853, between the two countries. The Commission was to consider the case of the American fishing schooner *Washington,* which, on May 10, 1843, had been seized while fishing ten miles from the shore in the Bay of Fundy, taken to Yarmouth, Nova Scotia . . . Accordingly on January 13, 1855, he decided the case on the basis of the three-mile rule in favor of the American owners of the *Washington.*

Id. at 85 (emphasis as in original) (footnote omitted).